

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TIMOTHY KING,

Plaintiff,

v.

Case No. 2:07-cv-84
HON. R. ALLAN EDGAR

DENISE GERTH,

Defendant.

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on February 19, 2008. The Report and Recommendation was duly served on the parties. The Court has received objections from defendant. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

In this case, as in every prisoner civil rights case, the court has already undertaken an initial review of the complaint. As part of that initial determination, the court decided that plaintiff stated a claim upon which relief may be granted. Defendant filed a "Motion to Dismiss," but based the motion on Rule 56(b). Rule 56(b) governs summary judgment and not motions to dismiss. There is a real difference that is often not appreciated.

Defendant's motion is based upon qualified immunity. Defendant is correct that when filing a motion to dismiss under Rule 12(b)(6), she does not need to file an affidavit or supporting evidence, because a motion to dismiss merely tests whether plaintiff stated a claim upon which relief could be granted. Plaintiff clearly did state a claim upon which relief may be granted in his complaint. Defendant's motion is denied. Moreover, if defendant intended the motion to be a motion for summary judgment under Rule 56(b), the motion is denied because defendant failed to establish a lack of a genuine issue of material fact.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #21) is approved and adopted as the opinion of the Court.

IT IS FURTHER ORDERED that defendant's motion to dismiss (Docket #13) is DENIED.

FINALLY, IT IS ORDERED that plaintiff's motion for an extension of time to file a reply (Docket #20) is DENIED.

Dated: 3/11/08

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE